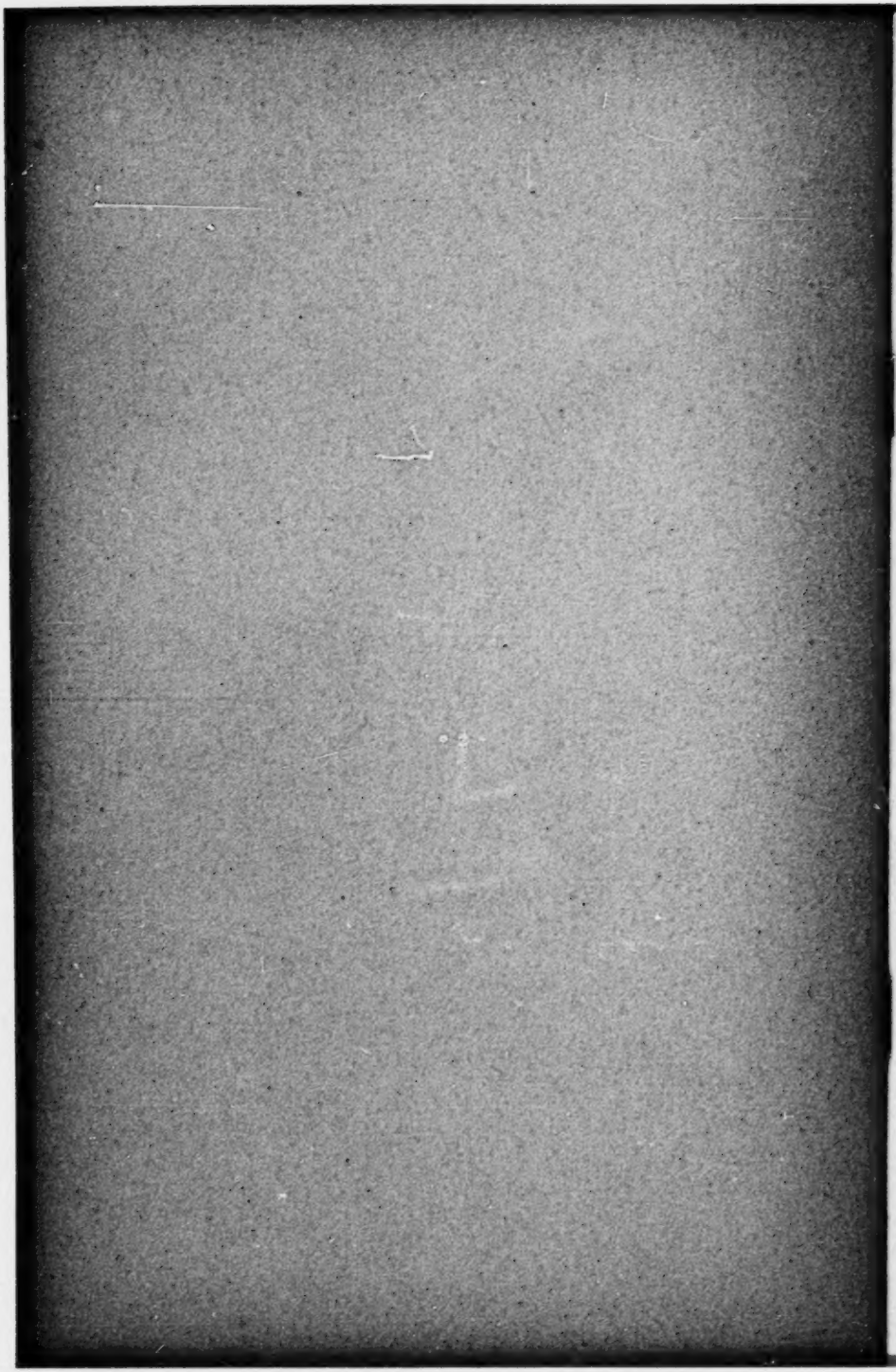

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IN THE

Supreme Court of the United States

October Term 1974

NO. 74-1161

DR. JAMES D. CLEMENTS, Director of the Georgia Mental Retardation Center, Individually

Petitioner,

—v—

ANDREW S. FARACA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

FRED L. CAVALLI

ROY A. ADILMAN
Counsel for Respondent

Post Office Address:

400 Colony Square
Suite 1633
Atlanta, Georgia 30361
Phone: 892-2500

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STATEMENT OF THE CASE

The facts of the case are stated fully in the decisions of the District Court (Petitioner's Appendix B, at 2b-13b) and of the Court of Appeals (Petitioner's Appendix A, at 3a-7a).

REASONS FOR DENYING THE WRIT

I.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

Petitioner apparently claims that this Court has never considered the enunciation of a standard of qualified immunity available to executive-level governmental officials; however, in his discussion Petitioner refutes his own argument by referring to the case of *Wood vs. Strickland*, . . . US . . , 43 U.S.L.W. 4293 (Feb. 25, 1975). Petitioner recognizes in his argument that this Court in *Wood* requires that a public official's conduct be judged not only on the basis of (1) good faith or permissible intentions, but also on (2) knowledge of the basic unquestioned constitutional rights of his charges. Therefore, rather than there being no standard enunciated by the court for the application of qualified immunity to a public official there is a standard with which Petitioner disagrees.

The basic point of disagreement raised by the Petitioner is that *Wood* requires public officials to know "unquestioned constitutional rights" and that this requirement is such a vague and demanding standard so as to destroy substantially the doctrine of qualified immunity. This court has already responded to this criticism:

> Such a standard neither imposes an unfair burden upon a person assuming a responsible public of-

> fice requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. *Wood vs. Strickland, supra,* 43 U.S.L.W. 4298.

Petitioner states that he who among other things has been the recipient of a bachelor's degree, a Medical degree, a Yale fellowship in mental retardation as a pediatric specialist is unaware of the statutory and constitutional prohibitions of the consideration of race with regard to employment. Is it logical to conclude that the man who formulated the programs at the Georgia Retardation Center and supervised and actively directed the Center for the last six years can be oblivious to such a well-entrenched doctrine that is so deeply manifested into our everyday lives? (Petitioner's Appendix B, p. 4b). Surely not! The Petitioner here was not acting in an emergency situation and was not attempting to enforce in good faith a rule or regulation but took affirmative action (denial of employment) which violated the known constitutional rights of the Respondent. For these reasons it is shown that the decision below was clearly proper and this Petition is not an appropriate vehicle for reversing or modifying this Court's decision in *Wood vs. Strickland, supra.*

II.

THERE IS NO CONFLICT IN PRINCIPLE WITH THE DECISIONS OF THIS COURT.

Here the Petitioner claims that the Circuit Court

applied neither the qualified immunity test of *Scheuer vs. Rhodes* 416 U.S. 232 (1974) nor the test set out in *Wood vs. Strickland, supra.* Firstly, it should be pointed out that *Scheuer* provides no new test for the scope of immunity available to state executive officials because the Complaint was dismissed on Motion and there was no evidentiary record on appeal. *Scheuer vs. Rhodes,* 416 U.S. 232, 249 (1974). Both the District Court and the Circuit Court felt that the Petitioner was entitled to be judged according to a good faith standard, but found that his actions were still wanting since any good faith (regardless of definition) displayed by the Petitioner was that of the good faith concern for the program he was administering as it related only to the *consequences* which might enure to that program due to his employing the Respondent. Both the District Court and the Circuit Court properly found that this consideration was irrelevant to a determination of the right to or appropriateness of relief available to Mr. Faraca as compensation for the loss of his employment opportunity. Additionally, both the District Court and the Circuit Court properly held "that a public official cannot find sanctuary from the consequences of an act of racial discrimination in a fear that public reaction will bring unfavorable results." (Petitioner's Appendix A, p. 10a) Since the only good faith that was demonstrated by the Petitioner was a fear of the *consequences* which could ensue from hiring the Respondent, the Circuit Court properly held such good faith not to be a defense; it distinguished the good faith fear of consequences from the situation of a public official who violates a citizen's rights in executing his duties in a way that he in good faith believes the law to require. Here the Circuit Court held that ". . . While the latter may constitute

a legitimate defense to a claim by an injured party, the former does not," and based its holding on *Pierson vs. Ray* 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) and *Monroe vs. Pape* 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d (1961). There has been no assertion by Petitioner that the doctrine espoused in *Pierson vs. Ray, supra,* is inappropriate when applied to his case, and there can be none.

With respect to the Petitioner's claim that the Circuit Court failed to apply properly the test in *Wood,* the Petitioner claims that his acts were not in violation of "settled indisputable law." Here the Petitioner claims that there was nothing settled about § 1981's (42 U.S.C. § 1981) proscription of the constitutional right to be free from interference with the anticipated contractual benefits. (Petition, p. 11.) With this assumption the Respondent emphatically disagrees. In *Sullivan vs. Little Hunting Park, Inc.* 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969) this Court found liability for *interfering* with the right to contract based upon 42 U.S.C. § 1982. Since both § 1981 and 1982 are derived from § 1 of the Civil Rights Act of 1866, 14 Stat. 27, the Circuit Court properly held that it would be logically inconsistent not to apply the *Sullivan* interpretation to a suit for interference with the right to contract guaranteed by § 1981. (Petitioner's Appendix A, p. 9a) The logic of the Circuit Court's opinion and the cases cited in support thereof are sound and Petitioner accordingly has presented no substantial questions for consideration by this Court.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

CERTIFICATE OF SERVICE

This is to certify that this day I have served Arthur K. Bolton, Attorney General and Carl C. Jones, Assistant Attorney, 132 State Judicial Building, Atlanta, Georgia, 30334 with a copy of the foregoing Brief by depositing same in the United States mail with proper postage.

This the 27th day of May, 1975.

Fred L. Cavalli

FRED L. CAVALLI

ROY A. ADILMAN,
Counsel for Respondent

400 Colony Square
Suite 1633
Atlanta, Georgia 30361
Phone: 892-2500